OPINION OF ADVOCATE GENERAL ELMER

delivered on 21 February 1995 *

Introduction

1. This action against a Member State for failure to comply with its obligations under the Treaty concerns the question whether the Federal Republic of Germany has disregarded its obligations by granting consent to the construction of a power station block without first undertaking an environmental impact assessment under the directive known as the EIA directive. [1] That directive provides that an environmental impact assessment is to be undertaken before consent is granted for certain civil engineering and other projects which are likely to have significant effects on the environment.

2. Under Article 12 of the directive Member States were to take the measures necessary to comply with the directive within three years of its notification, that is, before 3 July 1988. However, the Federal Republic of Germany implemented the directive only by a Law of 12 February 1990 which, with effect from 1 August 1990, replaced the Federal Law of 1974 on the prevention of pollution which had applied until then, the Bundes-Immissionsschutzgesetz (Federal Pollution (Protection) Law, hereinafter 'the FPPL').

On 31 August 1989 — that is, before the Law implementing the directive came into force, but after the expiry of the period prescribed for its implementation — the Regierungspräsidium Darmstadt (office for the administrative district of Darmstadt) notified its consent to significant alterations by the PreussenElektra Aktiengesellschaft to an existing coal-fired power station at Grosskrotzenburg consisting of constructing and operating a Block 5 described in the consent, with a heat output of 300 MW or more.

It appears from the consent, dated 31 August 1989, [2] that the Regierungspräsidium Darmstadt had decided not to carry out an environmental impact assessment according to the rules in the EIA directive, *inter alia* because the directive had not been transposed into German law.

* Original language: Danish.

1 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of certain public and private projects on the environment, OJ 1985 L 175, p. 40.

2 — Pp. 146 to 150.

The EIA Directive

3. The directive was issued in pursuance of Articles 100 and 235 of the EEC Treaty. According to the preamble, the aim of the directive is to promote an environmental policy in which the creation of pollution or nuisances is prevented at source rather than subsequently counteracting their effects. With that in view a procedure is instituted for assessing the effects on the environment at the earliest possible stage in all the technical planning and decision-making processes.

As may be seen from the following examination, the directive has 'in certain respects the character of a framework law. It establishes basic assessment principles and procedural requirements and then allows the Member States considerable discretion in the details of their transposition into national legislation, provided those basics are respected'. [3]

Article 2(1) of the directive provides that: 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects...'.

According to Article 2(2), 'the environmental impact assessment may be integrated into the existing procedures or, failing this, into other procedures or into procedures to be established to comply with the aims of this directive.'

The environmental impact assessment, according to Article 3, 'will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the inter-action between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

3 — See the Commission report of 2 April 1993 on the implementation of directive 85/337/EEC (COM(93)28, point 2.1).

According to Article 4 of the directive, projects of the classes listed in Annex I are always to be subject to an environmental impact assessment, whereas projects of the classes listed in Annex II are to be subject to an assessment only where Member States consider that their characteristics so require. Annex I mentions as paragraph 2 'Thermal power stations ... with a heat output of 300 MW or more ...' and Annex II gives as paragraph 12 'Modifications to development projects included in Annex I ...'.

Under Article 5(1) of the directive, Member States are to adopt the necessary measures to ensure that the developer supplies 'in an appropriate form' the information specified in Annex III to the directive, 'inasmuch as

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard *inter alia* to current knowledge and methods of assessment.'

Paragraph 3 of Annex III to the directive mentions, as information to be given in relation to Article 5(1): 'A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors'.

Article 5(2) refers to certain minimum descriptions and data, with summaries, to be included in the information provided by the developer.

Articles 6 and 7 contain rules for, respectively, consulting certain other authorities and for providing other Member States with information on projects.

Article 8 provides: 'Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure'.

Article 9 contains rules on informing the public concerned of the content of any decision taken and any conditions attached thereto and — where the Member States'

legislation so provides — of the reasons and considerations on which the decision is based.

4. The Commission report on the application of the EIA directive [4] contains (p. 9) a simplified flow chart of the EIA process and its relationship to project appraisal, authorization and implementation. The diagram provides an outstanding illustration of the EIA procedures. It is reproduced as an annex to Advocate General Gulmann's Opinion in Case C-396/92 *Bund Naturschutz in Bayern* v *Freistaat Bayern*, [5] which is, moreover, further discussed below.

Form of order sought by the parties

5. In this action the Commission has claimed that the Federal Republic of Germany should be declared to have infringed its obligations under Articles 5 and 189 of the EEC Treaty and under Council Directive 85/337/EEC, in particular Articles 2, 3 and 8 thereof, by granting consent for the construction of a new power station block in Grosskrotzenburg without first assessing its environmental impact.

The Federal Republic of Germany has claimed primarily that the application should be declared inadmissible and in the alternative that it be dismissed.

The United Kingdom has intervened in support of the defendant.

Admissibility

6. The German Government contends in the first place that the application should be dismissed as inadmissible because it is not formulated with sufficient precision. That line of argument is based on the wording of the application to the effect that Articles 2, 3 and 8 of the directive 'in particular' ('insbesondere') have been infringed. The German Government's view is that the use of the expression 'in particular' gives the impression that other provisions — not mentioned — are covered by the action.

The Commission states that the expression 'in particular' was inserted simply in order to specify which provisions were regarded as having been infringed.

As I see it, that part of the application is drafted sufficiently precisely for the German

4 — See the reference in footnote 3.

5 — [1994] ECR I-3717.

Government to realize that Articles 2, 3 and 8 are alleged to have been infringed. Those provisions are expressly mentioned in the application and the Commission is not claiming that the Federal Republic should be declared to have infringed any other provisions.

There is therefore no ground for declaring the application inadmissible on that basis.

An examination of the letter initiating the procedure and of the reasoned opinion shows that the Commission formulated its claim by reference to 'the directly applicable provisions of the directive', which are specified by the Commission in both documents and which are also stated to include Article 2. The defendant Member State was therefore in a position to defend its opinion by expressing in the defence and also in the rejoinder its points of view with regard to the question of 'infringement of Articles 2, 3 and 8'.

7. The Federal Republic further contended at the hearing that the application should be declared inadmissible in so far as it claims that Article 2 of the directive has been infringed, because the Commission did not include that article in the formulation of its argument in the reasoned opinion. An essential requirement of legal certainty, it is claimed, has thus been disregarded and in accordance with the consistent case-law of the Court this head of claim must therefore be declared inadmissible.

As the Court has consistently held, the reasoned opinion must in law 'be considered to contain a sufficient statement of reasons when it contains a coherent statement of the reasons which led the Commission to believe that the State in question has failed to fulfil an obligation under the Treaty'. [6]

6 — See the judgment in Case 325/82 *Commission* v *Germany* [1984] ECR 777 at paragraph 8.

There is therefore no ground, either, for declaring the application inadmissible as far as the claim of infringement of Article 2 of the directive is concerned.

8. The German Government further contends that the application should be declared inadmissible in view of the fact that it concerns not the general question of the Federal Republic's failure to implement the directive in question, but a specific omission to apply the rules of the directive.

The aim in bringing such a case before the Court is, according to the government, to encourage the Member State to implement the directive, but as that was done by the Law of 12 February 1990, the Commission has, in the Federal Republic's view, no legal interest in this case. That point of view is supported by the fact that the Commission has taken steps to institute an action for

infringement of the Treaty because of belated implementation of the directive. That case has not yet come before the Court. The contested consent has in addition been the subject of an action before the Hessischer Verwaltungsgerichtshof, which upheld the consent without finding it necessary to refer a question to the Court for a preliminary ruling.

9. Under Article 155 of the Treaty the Commission is, *inter alia*, to ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. The Commission does not have to show the existence of a legal interest in proceedings 'since, in the general interest of the Community, its function is to ensure that the provisions of the Treaty are applied by the Member States and to note the existence of any failure to fulfil the obligations deriving therefrom, with a view to bringing it to an end'. [7] It is therefore for the Commission alone to decide whether and if so when an action for infringement of the Treaty is to be brought. [8]

A failure to implement a directive in due time may give rise to a general action for infringement of the Treaty even if a Member State may subsequently have fulfilled its obligations — possibly before judgment. [9] It may however also be of essential significance to establish that the authorities of a Member State have in a specific case failed to comply with an obligation under Community law. For an assessment of the position under the rules of Community law of an authority's act or omission in a specific case, it must in principle be irrelevant whether the authority in question has acted in accordance with national rules or in breach of them as well.

It must be the Commission's own choice whether to bring an action for infringement of the Treaty regarding an alleged specific contravention, to bring an action for general infringement of the Treaty regarding a failure of implementation or to do both. As Advocate General Mischo stated in his Opinion in Case 168/85 *Commission* v *Italy*, [10] the specific nature of the procedure under Article 169 has the purpose of providing 'for a finding that conduct on the part of a Member State is contrary to its obligations under the Treaty and for the cessation of such conduct'.

The fact that the Court received no reference for a preliminary ruling in connection with the case which came before the Hessischer Verwaltungsgerichtshof — and as to which, moreover, no further information has been supplied — cannot affect the position. If a national court sees no ground for referring a matter to the Court of Justice for a prelimi-

7 — Judgment in Case 167/73 *Commission* v *France* [1974] ECR 359 at paragraph 15.

8 — Judgment in Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299 at paragraph 9.

9 — See for example the judgment in Case 39/72 *Commission* v *Italy* [1973] ECR 101.

10 — [1986] ECR 2945.

nary ruling, that cannot preclude the Commission from attending to its duties under the Treaty.

The effects of pollution and so forth, or as in this case infringement of the rules of the EIA directive, moreover frequently affect a rather indeterminate category of persons. It cannot be assumed as a matter of course that the individual Member States' legislation on the administration of justice gives environmental associations and organizations power to institute proceedings so that they may bring before the national courts actions for infringement of the Community rules on the environment in order to establish the infringement and if appropriate have it terminated. Monitoring by the Commission is therefore significant for ensuring the effective application of Community law, not least in the sphere of the environment.

This part of the defendant's argument as to inadmissibility must therefore also be rejected.

10. As a starting point for its claim, the Commission attaches importance to the fact that the relevant rules of the directive have direct effect.

The Federal Republic has contended that the action should be dismissed as inadmissible on the ground that only those rules of a directive which are unconditional and sufficiently precise may be relied upon by individual claimants before the national courts and that they do not provide a basis for this type of action for infringement of the Treaty. The basis of the case-law of the Court on direct effect of provisions of directives is that a Member State cannot plead its own failure to implement a directive, or its defective implementation thereof, as against citizens who may be able to base rights upon it, and thus concerns exclusively situations in which individuals' rights as against the State are at issue. On the other hand if it is not that category of persons who are relying on the provisions, the authorities cannot be required to apply such provisions, no matter how definite and precise they may be.

11. The Commission counters these considerations by stating that the case-law of the Court cannot be taken as indicating that a directive can have direct effect only in so far as it is relied upon as a matter of actual fact by individual claimants. If that were the case it would weaken the authorities' duty to comply with unconditional and sufficiently precise provisions of a directive and obstruct the Commission's task under Article 155. The Commission also calls attention to the judgment in Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and Others,* [11]

11 — [1991] ECR I-3757 at paragraph 15.

according to which a national court is not precluded from applying of its own motion precise and unconditional provisions of directives which have not been implemented. The opportunity for individuals to rely on the provisions of a directive which have the said characteristics is not therefore, in the Commission's view, a condition for recognizing the relevant directive's direct effect, but only a consequence of that effect.

12. I can subscribe to the Commission's point of view and would in addition refer to the judgment in Case 103/88 *Costanzo*. [12]

Advocate General Lenz, in his Opinion in that case, discussed that question in a manner which indicates how the problem relates to the abovementioned contention that the application is inadmissible.

In that case the question was raised whether an authority — such as a national court — is obliged to apply provisions of a directive which, from the point of view of their content, appear unconditional and sufficiently precise and to refrain from applying conflicting provisions of national law. In his Opinion in Case 103/88 Advocate General Lenz answered that question in the negative (section 36) because: 'it is not open to the administrative authorities to refer the matter to the Court of Justice and obtain a ruling on the direct applicability of the relevant provision of the directive. If it applies the directly applicable provisions of a directive and disregards conflicting national law, it does so at its own risk and without the endorsement of the Court. In my opinion they are entitled to act in this manner but are not obliged to do so, because the Treaty does not afford the requisite legal protection for doing so.'

In the case now before the Court the Regierungspräsidium Darmstadt expresses the same view in the reason given in the consent of 31 August 1989 for omitting an environmental impact assessment and following neither Directive 85/337/EEC nor the draft Law introduced for its implementation, and refers to the fact that otherwise fundamental conflicts might arise which could not be entirely resolved by the administration without disregarding the principle of the separation of powers, since in such a case the executive would have to put itself in the place of the legislature.

However, in Case 103/88 the Court did not follow Advocate General Lenz's Opinion. The Court declared that in all cases in which

12 — [1989] ECR 1839.

provisions of a directive appear, as regards their content, to be unconditional and sufficiently precise, individuals may rely upon them before the national courts as against the State, when the State has either failed to transpose the directive into national law at the correct time or has not transposed it correctly.

The Court accordingly stressed that when individuals are able to rely on the provisions of a directive before national courts in such circumstances, that is because the obligations arising from those provisions are valid for all authorities in the Member States. [13]

13. Thus when an authority such as a national court is required to apply unconditional and sufficiently precise provisions of a directive and to refrain from applying provisions of national law which are incompatible therewith, the Commission must be justified in instituting proceedings under Article 169 for a specific breach of that obligation.

In that respect the Commission cannot be required, as contended by the United Kingdom, to undertake first a general inquiry as to whether the German rules applicable, which the authorities have applied, might comply with the requirements of the directive. In relation to an action such as this for infringement of the Treaty regarding a specific disregard of obligations under Community law it must in principle, as stressed above in section 8, be irrelevant whether the authority in question has acted in accordance with national rules or in contravention of them.

14. The action cannot therefore be declared inadmissible on that ground either.

The date of application of the directive

15. As I mentioned in the introduction, the case concerns the question of the German authorities' failure to observe the requirements of the EIA directive with regard to an environmental impact assessment during a consent procedure concluded after the expiry of the period prescribed for implementation but before the German implementing Law of 12 February 1990 came into force.

The Federal Republic has contended that the EIA directive is not applicable in this case because in the government's view the consent procedure must be regarded as having started before 3 July 1988 when the directive, according to Article 12, should have been transposed into German law. In this respect the German Government has referred to

13 — See paragraphs 31 and 32 of the judgment.

the judgment of the Court in Case C-396/92 *Bund Naturschutz*. [14]

16. The Commission has referred to the fact that the directive does not contain any transitional rules and has claimed, as mentioned above, that the decisive point for the application of the directive must be the date of the consent to the project at issue. However, in case the Court should find that it is the date of the initiation of the consent procedure which is decisive, it appears from the decision of the Regierungspräsidium Darmstadt of 31 August 1989 that the consent procedure was implemented on the basis of the written application of PreussenElektra AG of 26 July 1988, which must therefore be the decisive date. The consent procedure thus began after 3 July 1988, when the directive ought to have been transposed into German law.

17. The Court asked the parties to inform it of the date on which the disputed consent procedure was initiated.

The German Government stated, as mentioned in the introduction, that the formal application for authorization of the power station block under the FPPL was submitted on 26 July 1988. [15] The government has further stated that the competent authority has a duty to provide guidance for the developer as early as the stage preceding the formal application. In this case the Regierungspräsidium Darmstadt was provided with information regarding the planned power station block on 18 May 1987 prior to the formal application and discussions took place on several occasions with that authority. Moreover various arrangements were made with a view to observance of the rules of Paragraph 10 of the Hessian Law on town and country planning prior to the formal application for consent under the FPPL.

18. Case C-396/92 *Bund Naturschutz*, mentioned by the Federal Republic, concerned the question whether the Federal Republic of Germany might, by means of a transitional provision in the implementing Law of 12 February 1990, waive the obligations imposed by the directive, to assess the environmental impact of projects for which the consent procedure was initiated prior to the entry into force of the national Law for implementation of the directive but after 3 July 1988.

The Court declared that, regardless of whether the directive permits a Member State to introduce transitional rules for consent procedures initiated before the time-limit of 3 July 1988, it is in all circumstances contrary to the directive to waive the obligations concerning the environmental impact assessment required by the directive for 'projects in respect of which the consent procedure was ... initiated ... after 3 July 1988' (paragraphs 19 and 20).

14 — See footnote 11.

15 — See in this respect Paragraph 10(1) of the FPPL, stating that 'das Genehmigungsverfahren setzt einen schriftlichen Antrag voraus' (the consent procedure shall be initiated by a written application).

The Court therefore gave judgment only on the specific situation before it, in which the applications for consent were lodged in September 1988 and later extended in November 1989.

Advocate General Gulmann reached the conclusion that 'the principle of legal certainty and the principles of protection of legitimate expectation and proportionality' may lead to 'an interpretation of the directive to the effect that the Member States may omit the environmental impact assessment for projects in respect of which the consent procedure was initiated before 3 July 1988'.

19. The question of the date of the application of the directive was thoroughly considered by Advocate General Gulmann, who drew attention, in his Opinion on the case, to the report on the application of the directive prepared and sent to the Council and the European Parliament by the Commission in pursuance of Article 11(3). [16] Advocate General Gulmann expressed the view, *inter alia* on the basis of the difficulties of implementation referred to in the report, that the three-year implementation period was not sufficiently long to enable any transitional problems to be resolved. In addition, because the environmental impact assessment is a process which must proceed in parallel with and as an integral part of the project consent procedure and because the directive, according to point 2.2 of the report, leaves it to the Member States to decide how and at what stages in the consent procedure the environmental impact assessment should be carried out, the obligation to carry out an assessment cannot in Advocate General Gulman's view, apply to all development consent procedures not completed by 3 July 1988.

The Advocate General's interpretation uses 'the initiation of the consent procedure' as the determinant date and calls attention at the same time to the fact that that concept might well be difficult to apply. As, however, there was no reason in Case C-396/92 to go further into solving that question of demarcation, a more precise definition of the concept was deferred for later cases.

20. Perhaps I may make it clear to begin with that I can concur with the considerations put forward by Advocate General Gulmann regarding the date of application of the directive.

21. The time-limit, as explained by the Federal Republic with regard to the consent procedure, illustrates however that, as emphasized in Advocate General Gulmann's Opinion, there may be difficulties in precisely establishing that point in time.

16 — See footnote 3.

An interpretation of the provisions of the directive according to which an environmental impact assessment is to be carried out for all projects for which an application for consent was made after 3 July 1988 provides, in my view, the most precise and, from the point of view of legal certainty, the most easily justified starting point. If it were to be decided to regard informal discussions and the like, which preceded the application for consent, as a part of the consent procedure, that might on the contrary give rise to confusion and legal uncertainty, which would appear to counteract the effectiveness of the directive.

Such an interpretation seems also to be in agreement with the Court's judgment in Case C-396/92 which, as I mentioned, concerned two projects with regard to which it was only established that the *applications* for consent were made after 3 July 1988. According to the wording of the judgment (paragraph 16): '... it is clear from the order for reference that the procedure which resulted in the two consent decisions ... was *initiated* after 3 July 1988' (my emphasis). According to the context it must therefore for the future be established by the judgment that the consent procedure is regarded as being initiated with the lodging of the application and that it will therefore be contrary to the directive to fail to make an environmental impact assessment of projects where the application was lodged after 3 July 1988.

22. In this case the Regierungspräsidium Darmstadt's consent of 31 August 1989 (pages 1, 6 and 104) refers to 'Antrag vom 26.7.1988' (application of 26 July 1988).

Irrespective of the rather informal contacts there had been, prior to the lodging of the application, between PreussenElektra AG and the Regierungspräsidium Darmstadt, and notwithstanding the guidance which may have been given on the procedure relating to the subsequent application, my view is that the date on which the consent procedure must be regarded as having been initiated is 26 July 1988 in this case.

23. I therefore find no reason for upholding the objection of the Federal Republic of Germany with regard to the date of application of the directive.

Is the project covered by Article 4(1) of the directive, in conjunction with Annex I?

24. The German Government and the United Kingdom have contended that the project for the construction of Block 5, which is operationally closely connected with the existing Grosskrotzenburg power station, must be regarded, in pursuance of paragraph 12 of Annex II to the directive, as a 'modification' of the existing power station

and as such must be exempted from mandatory environmental impact assessment. As regards such modifications such an environmental impact assessment is only to be effected where Member States consider that the characteristics of the project so require, and the limits to that discretion are not laid down in the directive.

25. The Commission has claimed, as previously mentioned, that the project is covered by Article 4(1) of the directive and paragraph 2 of Annex I thereto, in accordance with which 'thermal power-stations and other combustion installations with a heat output of 300 MW or more' are subject to compulsory environmental impact assessment. In that respect the Commission has stated that it is common ground that Block 5 has a heat output of at least 300 MW and that the expression 'modification of projects included in Annex I', as a derogation from the main rules of the directive, must in all circumstances be restrictively interpreted.

26. My view is that it must be possible to decide the legal question whether the new Block 5 is covered by Annex I to the directive without any need to decide the rather technical question of how closely Block 5 is connected with the remainder of the Grosskrotzenburg power-station.

It may be seen from the recitals to the directive that projects with significant effects on the environment must as a rule be subject to systematic assessment, whilst projects of other types may not necessarily have such effects and should therefore be assessed only where the Member States consider that their characteristics so require (eighth and ninth recitals).

In my view decisive importance must be attached to the fact that projects with environmental characteristics such as are mentioned in Annex I — in this case 'thermal power-stations ... with a heat output of 300 MW or more' — do not lose such characteristics simply through being constructed as an addition to an existing installation. It must therefore be irrelevant whether there is a close operational connection with the existing power-station or whether Block 5 is capable of operating independently. I therefore regard the purpose of Annex II on modifications as being solely to ensure that the question of an environmental impact assessment is considered by Member States in cases in which the modification in itself is not covered by Annex I. It is possible by this means *inter alia* to prevent evasion.

The Commission's claim that the project for the addition of Block 5 to the Grosskrotzenburg power-station was covered by Article 4(1), in conjunction with Annex I, on compulsory environmental impact assessment must therefore be upheld.

Do Articles 2, 3 and 8 of the EIA Directive appear, as regards their content, to be unconditional and sufficiently precise to be applied by national authorities?

27. To begin with, I must refer to what I previously stated in section 12 regarding the Court's judgment in Case 103/88 *Costanzo*.

28. The Commission claims that Articles 2, 3 and 8 of the EIA Directive are, as regards their content, unconditional and sufficiently precise for the relevant German authorities, after the expiry of the period prescribed for transposition, to have been obliged to apply them and to undertake an environmental impact assessment in accordance therewith, regardless of the fact that the authorities may thereby be disregarding national provisions on environmental impact assessment. Article 2 thus imposes on Member States an obligation to effect such an assessment without laying down special conditions therefor. Article 3 states precisely and sufficiently clearly and unconditionally what is to be assessed and needs no special implementing provisions for its application. The same applies to Article 8, which provides clearly that certain information is to be taken into consideration in the development consent procedure.

29. The German Government has stated, as previously mentioned, that under Article 3 of the directive it is not clear who is to undertake the environmental impact assessment and that the expressions 'the direct and indirect effects' and 'inter-action between the factors' in the same article, together with the expression 'taken into consideration' in Article 8 are too imprecise to be able to be taken into consideration by the authorities without supplementary national provisions. Further, a more detailed delimitation in implementing legislation of the concept of 'assessment' is needed in view of the complex nature of the problem — a delimitation such as was provided only in the German Law implementing the directive.

The government further points out that Article 2(2) of the directive states: 'The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures to be established to comply with the aims of this directive.'

30. I think the fact that Article 2(2) of the EIA directive leaves it to the Member States to decide whether the environmental impact assessment is to be integrated into the Member States' existing procedures for consent to projects or, failing that, into other procedures or into the procedures to be established to comply with the aims of the directive can scarcely be an obstacle to ascribing to Article 2(1) the effect relied upon by the Commission.

The fact that Article 2(1) prescribes that Member States are to adopt the measures necessary to ensure that the projects defined in Article 4 are subject to an environmental impact assessment before consent is given, seems to me, as regards its content, to be unconditional and sufficiently precise to be taken into account by the German authorities. There can scarcely be any doubt (see Article 1(2)) that it was the competent authority or authorities, in this specific case the Regierungspräsidium Darmstadt, which was to undertake the assessment.

As pointed out by the German Government, Article 3 is vaguely worded on certain points. The expressions 'in the light of each individual case' and 'in an appropriate manner' leave the Member States a discretion as to the detailed manner in which the assessment will 'identify, describe and assess' 'the direct and indirect effects', and the last expression seems sufficiently precise. The discretion thus allowed may however be specifically exercised by the authority concerned. 'Inter-action' between the factors mentioned in the first and second indents also seems to be a sufficiently precise expression. From the point of view of its content therefore, the provision seems unconditional and sufficiently precise to be applied by the German authorities which have to judge how the identification, description and assessment are to be undertaken in each individual case so that that may be effected 'in an appropriate manner'.

Article 8 also appears to be unconditional and sufficiently precise to be so described, though it may be accepted that the expression 'must be taken into consideration' is vague and does not seem in itself to impose any other requirement than that the information shall form part of the basis of the decision and thus of the guidance given by the authorities with regard to the interests the project is designed to serve and to the environment, just as the information may be reflected in conditions attached to the consent. [17]

Have the provisions been infringed?

31. The Commission states both in the initial letter and in the reasoned opinion that the German infringement of the Treaty consists in disregard of 'the directly applicable provisions of Council Directive 85/337/EEC', namely — according to the Commission — Articles 2, 3, 4(1), 5(2), 6(2), 8 and 9.

In the application, however, the claim is restricted to covering infringement 'in particular ... of Articles 2, 3 and 8 of that directive'. The Commission has expressly abandoned the claim regarding the infringement of Article 5(2) on the ground that it appeared

17 — Cf. the Commission report on the implementation of the EIA Directive (previously discussed in footnote 3), pp. 28 and 29.

that the developer had in all essentials supplied the information referred to therein.

At the same time the Commission abandoned the related claim with regard to infringement of the obligation under Article 6 to forward the information gathered pursuant to Article 5.

32. In support of its claim with regard to the infringement of Articles 2, 3 and 8 of the directive, the Commission has mentioned that the Regierungspräsidium Darmstadt followed a procedure which did not comply with the requirements of the directive for an environmental impact assessment. In particular no assessment was undertaken of the inter-action referred to in the third indent of Article 3 between the factors mentioned in the first and second indents. By the expression 'inter-action' the Community legislature wished to impose an obligation for a 'global assessment' of the interaction between the various environmental factors instead of the traditional assessment sector by sector.

33. In support of its contention that the application should be dismissed, the German Government has claimed that by abandoning its claim regarding an infringement of Article 5(2) of the directive the Commission has made it impossible, in view of the close connection between that provision and Articles 2, 3 and 8, for its claim with regard to infringement of the latter provisions to be upheld.

The government thus points out that the Commission abandoned its claim with regard to infringement of Article 5(2) because it recognized that the information referred to therein had been provided. It is thus uncontested that the developer, in accordance with Article 5(2) in conjunction with Article 5(1) has supplied 'in an appropriate form' the information specified in Annex III (see Article 5(1)). In that annex, which describes in detail in seven paragraphs the information in question, paragraph 3 refers to 'a description of the aspects of the environment likely to be significantly affected by the proposed project, including in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors'. With this the Commission must be regarded as having admitted that this information had been included in the consent procedure and had been taken into consideration in the consent.

To this it must be added that the procedure followed in this specific case complied with all the requirements of the directive. The government refers to the comprehensive treatment of the environmental impact in the decision of 31 August 1989 and to a detailed report of 11 November 1991 on the procedure leading up to that decision, prepared by the Regierungspräsidium Darmstadt during the pre-litigation phase of this case. From this it is clear, in the government's view, that in this specific case there was an exact assessment of the inter-relationship between the various environmental factors and that the authorities even anticipated the rules on

assessment which were only later brought into force in national law and that the interaction between the various environmental factors was precisely and fully taken into consideration.

34. I shall first observe that the Commission's application takes as its basis the fact that a Member State may be declared in breach of the Treaty regardless of which State, regional or local authority has failed to comply with the obligations under Community law. [18] However, the onus of proving that the rules have been infringed rests, according to consistent case-law, upon the Commission. [19]

35. It may be seen from Article 2(2) of the EIA Directive that the environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States. In this case the Regierungspräsidium Darmstadt followed the procedure prescribed in the FPPL for consent to projects. In the Commission's view, which is supported by academic writings, [20] the requirements with regard to environmental impact assessment laid down by the FPPL are not up to the standard of the requirements of the EIA Directive. Even if that were to be the case, however, that does not automatically mean that it may be taken as proved that the Regierungspräsidium Darmstadt has infringed the directive in this specific case. The Commission has not proved that it is impossible to comply with both sets of rules at one and the same time. It is therefore necessary to compare the specific chain of events with the rules of the directive before it is possible to judge whether there is an infringement.

In my view decisive importance must be attached to the fact that it is not contested that the information mentioned in Article 5(2) was supplied by the developer and thus was taken into consideration in the consent procedure. That information must *inter alia* concern the interaction between the factors mentioned in the first and second indents of Article 3: see in this respect the reference in Article 5(2) to Article 5(1), which again refers to Annex III to the directive. There it is stated in the latter part of paragraph 3 that the information shall include a description of the relationship — interaction — between the same factors as those mentioned in the first and second indents of Article 3.

It must be emphasized that the provisions of the directive are essentially of a procedural nature. By the inclusion of information on the environment in the consent procedure it is ensured that the environmental impact of the project shall be included in the public debate and that the decision as to whether

18 — See *inter alia* the judgment in Case 77/69 *Commission* v *Belgium* [1970] ECR 237.

19 — See for example the judgment in Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791.

20 — A. Weber: '*Die Umweltsverträglichkeitsrichtlinie im deutschen Recht*', Cologne 1989. Winter: 'Die Vereinbarkeit des Gesetzentwurfs der Bundesregierung über die Umweltverträglichkeitsprüfung vom 29.6.1988 mit der EG-Richtlinie 85/337 und die Direktwirkung dieser Richtlinie', *Natur und Recht* 1989, No 5. Jarass: 'Folgen der innerstaatlichen Wirkung von EG-Richtlinien', 1991, *NJW* 42, p. 2665.

consent is to be given shall be adopted on an appropriate basis. The directive on the other hand can scarcely serve as an instrument for monitoring the content of consents issued on the basis of environmental criteria. [21] Even though the expression 'must be taken into consideration' in Article 8 of the directive must mean that the information gathered is to be subjected to an independent, critical examination, [22] the directive does not prevent the competent authority's giving consent to a project, even though the environmental impact assessment shows that the project will have negative effects on the environment. [23]

It may be seen from the decision of 31 August 1989 that the Regierungspräsidium Darmstadt undertook a particularly extensive examination of the project and the objections put forward against it — see also the account produced by the German Government of the course of events leading up to the decision. It seems to me that the Commission has not provided the Court with any detailed substantiation of its argument that the information regarding the interaction between human beings, fauna and flora on the one hand and soil, water, air, climate and the landscape on the other which, it is not disputed, formed part of the consent procedure, was not also taken into consideration in connection with the consent for the project and thus included in the balancing of the various interests undertaken by the Regierungspräsidium Darmstadt as part of the consent as well as being reflected in the conditions attached to the authorization.

In this respect I would remind the Court that Article 9 of the directive leaves it to the Member States to lay down the extent to which decisions regarding consent to projects are to state the reasons on which they are based. It is thus only to the extent established by national law that there is an obligation to arrange for the decision to make clear the manner in which, in the individual case, the separate environmental factors and their interaction have been identified, described and assessed, and in what detail this information and the results of the hearings have been evaluated in connection with the decision. The fact that the Regierungspräsidium Darmstadt has included (only) the reasons required by the FPPL, which was applicable at that time, cannot therefore be taken as an indication that the said information on the environment was not taken into consideration in the decision of 31 August 1989. I would observe in this respect that the Commission has not put forward any claim that Article 9 has been infringed. On those grounds, in the absence of any evidence to the contrary it must be assumed that the Regierungspräsidium Darmstadt has caused the environmental information in question to be included in the basis for its decision and has thus taken it into consideration in connection with the consent procedure.

36. As the case has been presented I find, to sum up, that the Commission has not discharged the burden of proof to the effect that

21 — See Philippe Renaudière: 'La directive 85/337/CEE du 27.6.1985 concernant l'évaluation des incidences de certains projets publics et privés sur l'environnement' in *L'évaluation des incidences sur l'environnement: un progrès juridique?* Facultés Universitaires Saint-Louis, Brussels, 1991.

22 — Cf. Weber, p. 252, op. cit.

23 — Cf. Weber, p. 254, op. cit.

the Federal Republic of Germany has infringed Articles 2, 3 and 8 of the EIA Directive by granting consent for the construction of the new power-station block in Grosskrotzenburg.

The application against the Federal Republic of Germany should therefore be dismissed.

Costs

37. The Federal Republic of Germany has not asked for costs. In pursuance of Article 69(2) and (4) of the Rules of Procedure the costs of the action should be dealt with as stated below.

Conclusion

38. On the basis of the foregoing I propose that the Court give judgment as follows:

— The action brought by the Commission against the Federal Republic of Germany is dismissed.

— The parties and the intervener, the United Kingdom, are to bear their own costs.